# Understanding the Scottish Practicks

The Edinburgh Legal History Blog

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# ‘Understanding the Scottish Practicks’

## University of Aberdeen, 3-4 May 2013

### A Workshop

This Blogger was fortunate to attend this workshop last weekend. My own research is about eighteenth century Scottish lawyers' libraries and I was keen to find out more about one of the types of legal literature found in them.

‘Understanding the Scottish Practicks’ opened with a series of questions from **Professor John Ford**: how do the Scottish practicks form a genre, what did the category mean to early modern lawyers, and how do practicks relate to other forms of legal literature? These points informed the discussion of the practicks at this informative and enjoyable workshop in Aberdeen last weekend. Ford gave a brief history and description of the practicks to set the scene and offered Wittgenstein’s theory of family resemblance as a model for understanding them. Scottish practicks of the sixteenth and seventeenth centuries are obviously related to each other but sometimes it is not easy to tell how or why. Practicks share an obvious similarity in that they include case reporting but they can also include other aspects of legal practice. Other speakers at the workshop looked at some of the most important practicks in detail.

The creation of the various practicks was influenced by socio-political aspects in early modern Scotland. **Dr Julian Goodare** explained how the challenges in governing the tumultuous sixteenth century in Scotland – a time of Reformation, war, increasing population, inflation, and the colonisation of the New World – caused governments to have more problems and more people involved in the government activities. Questions about who had power and the development of the state meant that lawyers sought certainty about what the law was. They turned to collections of old laws such as the *Regiam Majestatem* and combined these with new Acts of Parliament. In this turbulent time, lawyers may have created practicks as a reflection of their desire for something like a new version of the *Regiam Majestatem*.

What did the Scottish practicks contain? **Professor Gero Dolezalek** described the sixteenth century practicks of Sinclair (1540-49) and Colville (1573-92) as case reporting, deliberations of judges, and cases pending in court. Many cases are not in the court registers since there was no final decree for them. This makes it difficult to match the details in the practicks with those in case books. Both Sinclair and Colville’s practicks show that the Scottish courts worked as *ius commune* courts: it was taken for granted that continental *ius commune* sources would apply when there was no Scottish custom available. Both Sinclair and Colville cited Roman and canon law and the standard commentaries on them in preference to native Scots law.

**Dr Andrew Simpson** identified a change in the structure of practicks in the 1560s which was related to the proposal and work of printing the laws of Scotland. The purposes of the practicks of Chalmers and Balfour were to promote medieval texts, re-organise learning, and codify Scots law. By the 1560s, judges and lawyers wanted texts which were easier to use. Alphabetical organisation of the material made it more accessible for practitioners. The newly arranged cases were also useful for students and this new type of structure for the practicks made them

good textbooks to educate lawyers in the unique body of Scots law and it is notable that space was left on their printed pages for annotations.

**Jamie Ross** explored the use of canon law in the practicks of Balfour and Spottiswoode. Balfour's practicks were widely circulated and had a similar structure to Regiam Majestatem. Although they wanted to remove canon law, Reformation-era jurists found there was still good law to draw on from that source. Although later in date than Balfour's, Spottiswoode's practicks also include references to canon law. Spottiswoode may have been influenced by English civilians since he studied law at Oxford. Both Balfour and Spottiswoode turned to canon law for principles not specific points of law. Canon law still had uses in Scotland well after the Reformation.

The second day of the workshop opened with **Professor John Finlay**'s investigation into how the practicks were perceived and used in the eighteenth century. From the late seventeenth century, Session Papers show that lawyers tended to cite whatever sources they thought would carry the most weight with the judge. Roman law, case law, and English law were most popular. Printed 'Decisions' – the descendants of practicks – were preferred to manuscript sources. By the mid-eighteenth century, almost all of the practicks were available in print. They were still used despite concerns about lack of accuracy. As Hew Dalrymple put it in 1725, it was better to have a bad rule than no rule to follow. The practicks could be used as sources for rules whatever their quality.

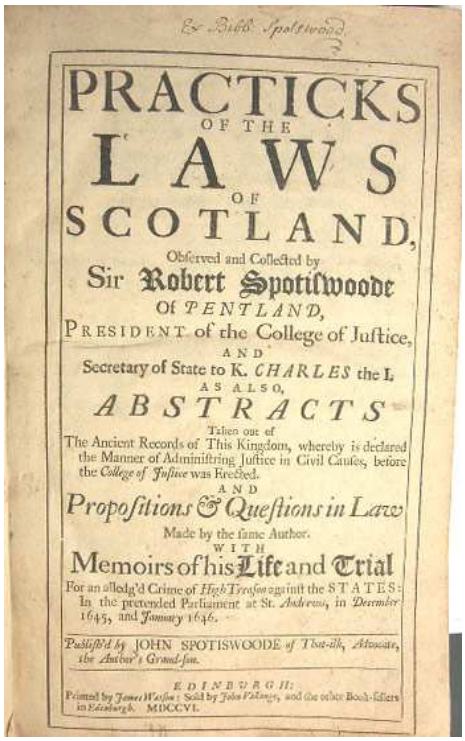
**Professor John Cairns** considered Spottiswoode's practicks with special reference to the printed edition produced by the jurist's grandson in 1706. This version included annotations by its editor and implied that the senior Spottiswoode's work should be seen as rivalling that of Stair. As do other practicks, Spottiswoode's drew on a wide range of sources. What is striking about the citations in Spottiswoode is the use of Scottish sources including Craig, Skene, Balfour, and Regiam Majestatem. Spottiswoode also referred to the ius commune literature of French legal humanists including Faber and Cujas. Since the references are from printed sources, it is unclear which Spottiswoode is doing the citing and more work is needed to track down the citations and work out how they were being used.

Practicks cannot be seen in isolation. **Professor Sara Brooks** has identified parallels with the form used by Haddington used in his practicks with contemporary Scottish kirk records. Haddington's practicks are among the least accessible. They cover 2300 cases from 1592 to 1626 and were probably used as an aide memoir by their creator. There is little reference to authority: these are records of final determinations. The cases are arranged as they happened and there is no indexing to guide the reader. In this Haddington's practicks resemble the minute books of the Scottish kirk which record unique incidents and local concerns. As with court decisions, they show concern with regulation and the top-down power of institutions.

The authors of practicks are not always known. **Dr Adelyn Wilson** discussed three practicks of the Interregnum and speculated about their use and influence. Collection A might have been created by an 'early career' advocate who kept the information for his personal use and learning. Collection B also seems to have been made for educational purposes perhaps by an expectant to the Bar. Both rely on native sources in their citations. The 282 entries in Collection B relate to cases between 1657 and 1658. The collection is notable because it was used by Stair. A third collection was been lost but was also used by Stair. The Interregnum collections are especially interesting since they were not kept by judges but they were still cited in later works.

Each day of the workshop ended with a round-table discussion of the day's papers and ideas. It is certain that all who attended now have a much better idea of what we mean when we talk about Scottish practicks. There is much more work to be done with these fascinating texts of legal history and how they relate to each other.

It is hoped that Adelyn Wilson and Andrew Simpson will publish a full report of the workshop along with details about ongoing projects relating to the practicks.



Ex Bibl. Spotswood.

PRACTICKS
OF THE
LAWS
OF
SCOTLAND,
Observed and Collected by
Sir Robert Spotiswoode
Of PENTLAND,
PRESIDENT of the College of Juſtice,
AND
Secretary of State to K. CHARLES the I.
AS ALSO,
ABSTRACTS
Taken out of
The Ancient Records of This Kingdom, whereby is declared the Manner of Adminiſtring Juſtice in Civil Cauſes, before the College of Juſtice was Erected.
AND
Propoſitions & Queſtions in Law
Made by the ſame Author.
WITH
Memoirs of his Life and Trial
For an alledg'd Crime of High Treaſon againſt the STATES: In the pretended Parliament at St. Andrews, in December 1645, and January 1646.
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